General Motors Corporation, Assembly Division *and* John Barea. Case 7-CA-18157

April 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 4, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, General Motors Corporation, Assembly Division, Ypsilanti, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me in Detroit, Michigan, on June 18, 1981, pursuant to complaint issued on September 29, 1980, and charges timely filed and served. The complaint alleges John Barea was discharged in violation of Section 8(a)(1) of the Act because he sought to invoke provisions of the collective-bargaining agreement between General Motors Corporation, Assembly Division (Respondent) and Local 1776, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (called the Union), at all times relevant to this decision. Respondent denies the commission of any unfair labor practices.

Upon the entire record and my observation of the demeanor of the witnesses as they testified, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent, a manufacturer, meets the Board's direct outflow standard for the assertion of jurisdiction and is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The parties entered into the following stipulation at the outset of the hearing:

1. The practice of Respondent under Local Demand 89 in the collective-bargaining agreement between Local 1776, UAW, and Respondent has been so routinely allow employees to leave the plant to see their personal doctor once they have requested permission from their foreman to do so before punching out.

2. On July 30, 1980, after John Barea (the Charging Party or Barea) had left the plant, he went to his personal physician, who examined his back and issued him an excuse from returning to work until Monday, August 4, 1980, the Charging Party presented his excuse from his doctor to Ronald West, his foreman.

3. On July 31, 1980, Barea had a previously excused absence to accompany his wife to her personal physician.

4. At all material times herein, Ronald West and Randy Cochran have been agents of Respondent within the meaning of Section 2(11) of the Act.

When the stipulation is supplemented by other evidence, largely uncontroverted, a more informative picture emerges.

The existing collective-bargaining agreement contains the following provisions:[1]

Local Demand No. 89

> Demand any employee who is injured or becomes ill and requests permission to visit his personal physician be permitted to do so immediately.
>
> Management's Answer:
>
> In claims made by employee of personal illness sufficiently compelling to warrant a request that they be granted permission to leave the plant to seek the advice of their personal physician, supervi-

[1] I am persuaded by the comments of the parties and other evidence in the record that "Management's Answer" constitutes the effective agreement between Respondent and the Union.

sion will honor such request with the understanding, however, that the employee will be required to submit satisfactory evidence upon his return to work to support his claim that his only purpose in leaving the plant was specifically to obtain immediate medical treatment on the date of his departure from the plant. Employees on the second shift who are refused medical treatment at a hospital the night they leave the plant and substantiate this claim, will be given consideration for their absence provided they seek medical attention the following day. This does not preclude the possibility of a foreman exercising his authority to excuse any employee who may not necessarily be sick enough to cause him to require treatment from his doctor, but who has convinced his foreman that his stay in the plant would not be in his best interest from the standpoint of his health.

Management states that in addition employees on the second shift with dental ailments who fail to respond to plant medical treatment and are unable to obtain emergency treatment will be given consideration for their absence provided they seek medical attention the following day and submit satisfactory medical evidence upon their return to work.

John Barea is a journeyman toolmaker who has been employed by General Motors at various facilities. He was laid off at the General Motors Fisher body plant, Livonia, Michigan, in April 1980 and commenced work at the plant involved herein on July 21.[2] His workday ran from 7 a.m. to 3:30 p.m. when he was terminated August 5.

Before noon on July 29, Barea was repairing a moving body gate[3] on the assembly line. Tooling Supervisor Ronald West was present. As Barea changed his position he was struck in the back and knocked down by the moving body gate. West helped Barea up and urged him to go to the clinic. Barea refused to go to the clinic, took aspirin to alleviate the pain in his back, and worked through the shift. That evening his back pain interfered with his sleep.

On July 30, Barea punched in at 7 a.m., went to the toolcrib, picked up his tools, and went to the body shop where he and fellow employee Constantine Handrinos were on call for service and maintenance work. At or about 7:15 a.m., Barea told Handrinos he was going to the clinic and left. Approximately 5 minutes later, West came to the toolcrib with a repair assignment for Barea, but found him gone. Hearing that Barea had gone to the clinic, West proceeded to the body shop clinic. Barea was not there. West then discovered, via a phone call by clinic personnel, that Barea had gone to a different clinic in the plant. West then turned to other problems requiring his attention.

Barea was examined by a physician at the clinic. After this examination the clinic nurse gave Barea some medication and told him he was authorized to go to work. Barea asked her for a pass to leave the plant to see his own doctor. The nurse advised that the clinic could not issue such a pass and he would have to see his foreman.

Barea then went to the timeclock and punched out at 8:51 a.m. Barea concedes that when he punched out he had already decided to leave the plant to see his doctor whether or not he had permission. In so doing, he accidently obliterated his punchin time by overpunching it with the punchout time, which was also illegible. He then turned the card over and again punched out on the back of the card. Concerned about the state of the card he then went to Roy Adams, Barea's former supervisor, showed him the timecard, and explained how he had overpunched it. Adams assured him there would be no problem with the timecard. Barea remarked that he was not concerned because Respondent would have to pay him if they fired him. I credit Adams on this point. I credit Barea that he told Adams he had punched out because he was going home to see his doctor.

West came into Adams' office about 9:10 a.m. and asked Barea where he had been and what was going on. Barea related his experiences at the clinic, and told West that he had punched out, was on his own time waiting for an insurance man, and was going to see his own doctor. He asked West for a pass. West refused to give him a pass and warned he was leaving without authorization.[4]

Handrinos credibly testified that Barea returned to pick up his tools after he had left to go to the first aid station.[5] Barea told Handrinos he was going home to see his doctor and a lawyer. Handrinos asked if Barea had a medical pass. Barea replied that he had no pass and needed none, and added that he was punched out and on his own time and had just come to remove his tools. West came up at this point and told Barea again that he was leaving without authorization. Barea drove off in a welding buggy without further comment.

Barea then talked to employee William Bellante, who advised him that he had a contractual right to leave and the foreman could not make him stay on the job if he was injured. Bellante suggested that he call West and again ask permission to leave. Bellante dialed West's number at or about 10:15 a.m. When West answered, Barea requested a pass. West replied that Barea was leaving without West's authorization and he, West, would not issue him a pass. Barea left the plant shortly thereafter. West explains that he refused to issue the pass because it would constitute condonation of Barea's earlier conduct in punching out and telling West he was going to a doctor and was on his own time.

A few days prior to this sequence of events on July 29 and 30, Barea told Roy Adams that he was unhappy because he had been called to work at the Ypsilanti plant, involved herein, while he was on layoff because he did not want to do this and would prefer not coming in to

[2] All dates herein are 1980, unless otherwise noted.

[3] A body gate is a large tooling fixture on a moving conveyor line.

[4] This account of the 9:10 a.m. meeting is a fair synthesis of the credible portions of the testimony of both West and Barea. I specifically credit Barea that he asked West for permission to leave, noting that such action is consistent with the nurse's advice that he should seek a pass from his foreman after his initial request to her.

[5] I conclude it was about 10 a.m. when Barea returned because West came upon him talking to Handrinos about an hour after 9 a.m. or 9:10 a.m.

work if he had a choice. Barea also told Adams that he would have no trouble going on medical leave because he knew the "ins and outs." This is Adams' version and I credit it. Barea denies the statements Adams attributes to him, denies knowing the "ins and outs," but concedes he had earlier been on medical leave with a back injury at the Livonia plant. This concession does not inspire confidence in his denials of any knowledge of the "ins and outs" of medical leave, or that he claimed such knowledge when talking to Adams. Moreover, I have found Adams a more believable witness where their testimony conflicted on other points, and Adams was the more believable witness in this instance.

Barea visited Dr. Gary Knapp on July 30, was treated for "work injury" of July 29, and was released by Dr. Knapp to return to work on August 4.[6]

Barea returned to work on August 4. A meeting between Barea, West and Randall Cochran, Respondent's labor relations representative, on that day was canceled when Barea arrived with an abrasion on his head and was sent to the plant clinic for treatment.

A meeting was held on August 5 with the same three participants. Pressed for an explanation of his activities on July 30, Barea told West and Cochran that he had told Adams he was going to medical[7] prior to so doing, and that he had later had a SUB (supplemental unemployment benefit) card in his pocket while talking to Adams and West around 9: a.m. After a brief recess during which Cochran investigated Barea's statements, Barea admitted that he had not told Adams he was going to medical, and also admitted that he had his timecard in his possession rather than a SUB card when he talked to Adams and West.[8] Barea also told Cochran that he had not punched his card out before he asked for a pass, but now concedes this was not true, and explains he did not tell the truth because he feared disciplinary action and recognized that the meeting seemed to revolve around the issue of whether he had asked permission to leave before punching out. Cochran and West recessed a second time and agreed Barea should be discharged as an unsatisfactory temporary employee. They so advised Barea. West read the discharge notice to Barea. The notice states the following as reason for the discharge:

> "FOR CAUSE."
>
> ON WEDNESDAY, JULY 30, 1980, YOU CLOCKED YOUR TIMECARD OUT AT 8:51 AM AND THEN INFORMED YOUR SUPERVISOR YOU WERE GOING HOME. YOU LEFT THE PLANT WITHOUT PERMISSION. FOR THIS, YOU ARE DISCHARGED AS AN UNSATISFACTORY TEMPORARY EMPLOYE. [sic]

Barea refused to sign an acknowledgment of receipt of the notice, and requested his union committeeman who was promptly called and met privately with Barea. Thereafter, the committeeman and Barea met again with West and Cochran. West and Cochran refused to reconsider the discharge. Subsequently a grievance was filed on Barea's behalf, but its current status is not shown in the record.

B. *Conclusions*

It is uncontroverted that Barea suffered a back injury on July 29,[9] and that the resulting pain caused him to go to the clinic on July 30.

There is no requirement that an employee be content with the diagnosis or treatment proffered by the plant clinic personnel. The contractual provision involved herein impliedly, if not expressly, displays management's recognition that employees may well prefer to be treated by their personal physicians. In acknowledgement of the reasonableness of this employee preference, Respondent has agreed, via its contract, that permission to leave the plant for such purposes will be given, provided that the excused employee later gives proof that he or she did in fact leave for such purposes. Supervision is required by the contract to grant the permission requested. The contract provision in issue provides no option for a supervisor to refuse permission, but places the burden on the employee to show upon his return that the absence was warranted.

The parties stipulated that permission to leave to visit a personal physician has been routinely given upon request made "before punching out." I would suspect that employees would normally request permission to leave before punching out, but there is no evidence the sequence of punching out is relevant to either the contractual provision or the established company practice of granting permission.[10]

Barea had an arguable right under the contract to be permitted to leave for the purpose of consulting his physician about his injury, and West had no apparent contract right to refuse that permission.[11] When Barea left, after permission had twice been denied by West, he had fulfilled his request obligation and was asserting a contractual right to leave.

The Board has succinctly stated the applicable law in the following terms:

> . . . his assertion of that right constituted a grievance within the framework of the contract that affected the rights of all the unit employees. The Board has consistently held that Section 7 of the Act protects employees attempts . . . to implement

[6] Barea had already been excused from work on July 31 for reasons unrelated to this case.

[7] Medical appears to be a synonym for plant clinic.

[8] The recitation of events to this point is derived from credible testimony of Cochran.

[9] That he declined to seek medical attention that day but worked several hours through the the end of the shift, contenting himself with dosages of aspirin to lessen his pain, is persuasive evidence that he is not, contrary to suspicion raised by the evidence before me, a malingerer whatever his other faults may be.

[10] Respondent claims one Jeff Harris was discharged for leaving the plant without permission to go to the hospital, but Harris apparently neither punched out nor requested permission. In any event, the treatment of a former employee that has never been litigated as to its legality is neither dispositive of the issue before me nor persuasive evidence that Barea was properly treated.

[11] West had no reason to believe that Barea did not have a "sufficiently compelling" reason to visit his doctor for examination of injuries suffered in West's presence on July 29.

> the terms of bargaining agreements irrespective of whether the asserted contract claims are ultimately found meritorious and regardless of whether the employees expressly refer to applicable contracts in support of their actions or, indeed, are even aware of the existence of such agreements.[12]

That Barea had made up his mind to leave, had improvidently punched out, and advised West of his intention before seeking permission does not materially alter the situation. West was possibly affronted by what he may have perceived as a challenge to his authority, but this did not diminish his obligation under the contract to grant the requested permission. Barea's expression of intention harmed no one, and this together with his precipitous punching out could have been dealt with in ways other than a denial of the permission without any appearance of condonation by West. The argument that permission could not have been granted without paying Barea for the time spent in the plant until the minute of the grant strikes me as pure makeweight. There is no apparent reason why the permission could not have been made effective retroactively to the time of punching out, and I simply do not believe Respondent is required to pay employees for time they spend in the plant of their own volition when not actually on the clock or performing any portion of their duties. In any event, this has not been shown to be the case by anything more than Respondent's mere *ipse dixit.*

The action of one employee in invoking a contractual right is every bit as protected and concerted as a similar invocation by two or more, and has long been viewed by the Board as an "extension of the concerted activity giving rise to the agreement,"[13] and to be protected activity.[14] Barea had an arguable right to leave, and neither the contractual provision involved herein nor Respondent's routine practice of granting permission to leave provide for the refusal of such permission because of intervening circumstances where the request is based on reasonable cause. Barea had reasonable cause and provided proof that he had in fact left for the reason asserted. In my view, there was nothing sufficiently serious in Barea's conduct on July 30 to warrant West's denial of permission, and Respondent has not shown by a preponderance of the evidence that there was. I am persuaded that Barea's discharge was precipitated by his leaving, not his punching out.[15] Inasmuch as Barea's leaving was protected activity, his discharge for that activity violated Section 8(a)(1) of the Act.

Respondent raises *ITT Continental Baking Company, American Bakeries Company, Inc.*, 253 NLRB 1174 (1981), as authority for the proposition that Barea was required to exhaust his contractual remedies prior to resorting to self-help. *ITT Continental* is inapposite to the case at bar. In that case three employees walked out to protest bun pans that were too hot to handle. The Board found this was not protected activity because the employees were required under the contract to submit their complaint to the grievance procedure and abide by their contractual obligation not to strike. Apart from the obvious untenability of any theory that an injured or ill employee must refrain from leaving work without permission at least until the grievance procedure is exhausted, the issue of contractual obligation not to strike is not pertinent to this case. Essentially, the employees in *ITT Continental* left work in protest of a working condition and therefore struck. Barea was not refusing to work in protest of a working condition, but was asserting a right to leave for a specific purpose explicitly covered by contract provisions. He returned to work promptly on the date prescribed by his physician and did not seek to withhold his labor in order to pressure Respondent into doing anything. In short, Barea was not striking.[16]

Upon the foregoing findings of fact and conclusions based thereon, and upon the record as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging John Barea because he engaged in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.
4. The unfair labor practice set forth above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In order to remedy the unfair labor practice found herein, my recommended Order will require Respondent to cease and desist from further violations, to post an appropriate notice to employees, and to offer John Barea unconditional reinstatement to his former job, or a substantially equivalent job at the same facility if his former job no longer exists, and make him whole for all wages lost as a result of his unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[12] *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975).

[13] *Key City Mechanical Contractors, Inc.*, 227 NLRB 1884, 1887 (1977).

[14] *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[15] I note that neither Adams nor West raised the issue of his punching out with Barea, and West's admonitions that Barea's leaving would be unauthorized clearly demonstrates it was the actual leaving that was West's overriding concern.

[16] Respondent's request in its post-hearing brief that I take judicial notice of the portion of the contract's grievance arbitration provision containing a no-strike agreement is denied.

[17] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[18]

The Respondent, General Motors Corporation, Assembly Division, Ypsilanti, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating in any manner with respect to their tenure of employment or any other term or condition of employment because they engage in concerted activities protected under Section 7 of the Act

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to John Berea immediate and full reinstatement to his former job or, if his former job no longer exists, a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records required to analyze the amount, if any, of backpay due under the terms of this Order.

(c) Post at Ypsilanti, Michigan, offices and facilities, copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in concerted activities protected under Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer John Berea immediate and full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest computed thereon.

GENERAL MOTORS CORPORATION, ASSEMBLY DIVISION

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[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."